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February 14. 1771.

ANSWERS

FOR

Kenneth Mackenzie, commonly designed *Tutor of Kilcoy*, Sir Harry Monro of Fowlis, Baronet, Thomas Mackenzie of Highfield, Captain John Roſs of Balnagown, William Baillie of Roſs-hall, John Mackenzie of Avoch, William Mackenzie of Belmaduthie, Sir Alexander Mackenzie of Coull, Baronet, Alexander Mackenzie of Dachmaluach, John Mackenzie of Brae, and Alexander Mackenzie of Hilton,

TO

The PETITION of Roderick Mackenzie of Scotſburn.

WHEN the real merits of this cauſe ſhall be fairly ſtated, ſtripped of all diſguiſe, the reſpondents perſuade themſelves, that the attempt here made on the part of the petitioner, whether real or nominal purſuer, to revive thoſe feuds and animoſities with which this county was unhappily diſtracted in former times in the choice of a collector of ſupply, but which, by the coalition of parties, has happily been ſuppreſſed for the laſt ten years, will not be approved of by your Lordſhips.

The reſpondent Kenneth Mackenzie, in the character of officiating collector of ſupply of the county of Roſs for this current year, and the other ten reſpondents, in the character of commiſſioners of ſupply of ſaid county, are called as defenders in a proceſs

ceſs of declarator and reduction, at the inſtance of the petitioner Roderick Mackenzie of Scotſburn. Under the firſt of theſe, he inſiſts to have it found and declared, That he the petitioner was duly elected into the office of collector of ſupply of ſaid county for this current year, by a majority of legal votes, in a meeting of the commiſſioners of ſupply held upon the 30th of April laſt; notwithſtanding of which, Sir Harry Monro of Fowlis, as preſes of ſaid meeting, under pretence of an equality of votes, had taken it upon him to declare the election in favour of the reſpondent Kenneth Mackenzie; who, under colour thereof, and of an after act and order of the commiſſioners of ſupply, in their adjourned meeting upon the 1ſt of June thereafter, had aſſumed ſaid office, and continued ſtill to act therein.

And under the other branch of this ſummons, he concludes for reduction of the aforeſaid minute of the adjourned meeting 1ſt June laſt, ordering a commiſſion to be made out in favour of the reſpondent Kenneth Mackenzie, as collector of ſupply of this current year; and as the other ten reſpondents, being a majority of ſaid adjourned meeting, concurred in the order then given for making out the commiſſion in favour of the reſpondent Kenneth Mackenzie, in conſequence of which he found caution, and entered upon office, he concludes againſt the ſaid Kenneth Mackenzie, That he ſhould be diſcharged from further executing ſaid office, or from drawing any part of the ſalary and emoluments thereof, and to repay to him the purſuer what part thereof he may have already received; and that the whole defenders ſhould be decerned in payment to him of the ſum of L. 50 Sterling of expences of proceſs.

And it ſtands fairly confeſſed, that the ſingle purpoſe of calling the other ten reſpondents as defenders, in their character of commiſſioners of ſupply, is to ſubject them to the expences of proceſs on account of their alledged tortious proceedings in the aforeſaid adjourned meeting of the 1ſt of June.

Such being the avowed purpoſe of this proceſs, to get hold of the ſalary, when the reſpondent Kenneth Mackenzie has performed the duty of that office, upon caution found for the faithful execution thereof; in conſequence of which, he has already collected three quarters of this year's ſupply, and is *in curſu* of collecting the remaining quarter, the office itſelf being to expire in a

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few weeks; it muſt readily occur to your Lordſhips, what embarraſſment it would occaſion in the collection of this year's ſupply, was the petitioner now to enter upon that office, ſuppoſing the merits of the election itſelf to ſtand in his favour.

It was for this reaſon, not from any apprehenſion upon the merits of the election itſelf, that the reſpondents declined entering upon the merits, and ſtating a preliminary defence, That all parties having intereſt were not made parties to the proceſs, viz. the whole commiſſioners of ſupply of this county, who were all equally intereſted in the queſtion reſpecting the election of their collector, for whom they were anſwerable; and more particularly, in reſpect that the other commiſſioners, conſtituent members of the meeting of the 1ſt of June, whoſe act or order of that date was ſought to be reduced, did neither concur in the purſuit, nor were called as defenders: and though the Lord Ordinary's interlocutor 19th January laſt, which is brought under review by the petition now to be anſwered, goes no further than to "ſuſtain the "defence, That the whole of the commiſſioners of ſupply, who "voted for and elected the defender Kenneth Mackenzie upon "the 30th April laſt, were not called as parties to this proceſs," the objection, as ſtated, goes ſo much further, that the whole commiſſioners in the ſupply-act of that year, and more particularly thoſe who were the conſtituent members in both the aforeſaid meetings of the 30th of April and 1ſt of June, whether they favoured the one candidate or the other, ought to have been made parties to the proceſs, either as purſuers or defenders, as they had all one joint intereſt, and were all equally anſwerable for the collector.

And though the merits of this preliminary objection lies within a very narrow compaſs, as the petitioner has thought proper to arraign the conduct of the ten commiſſioners (called as defenders) met upon the 1ſt of June, as a packed meeting, partial and unjuſt, theſe reſpondents hope to be excuſed, if, in juſtification of their own conduct, and vindication of their character, ſo unjuſtly attacked, they enter into a more minute detail of facts than might otherwiſe ſeem neceſſary.

The landholders in the county of Roſs conſiſt chiefly of gentlemen of three different clans or names; and as their natural attachment to thoſe of their own clan was productive of conſtant diſputes, and little political feuds, in the choice of their collector,

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the county was, by means thereof, kept in a perpetual ferment in the annual election of their collector; which occaſioned a deal of ill blood amongſt individuals.

In 1761, the deceaſed Mr Roſs of Kindeace, and the now reſpondent Kenneth Mackenzie, ſtood candidates for this office upon very ſeparate and oppoſite intereſts; and as this was likely to occaſion a ſort of civil war in the county, it was at length happily terminate, by a coalition of the oppoſite intereſts, and an unanimous appointment of both theſe candidates to be joint collectors, the ſtated ſalary of L. 80 being equally divided between them.

Upon this footing matters continued till the year 1770, to the general ſatisfaction and peace of the whole county, they being annually re-elected into ſaid office.

But as Mr Roſs of Kindeace happened to die in the end of the year 1769, not in very opulent circumſtances, leaving a numerous family of young children, ſome of the friends of that family propoſed to the reſpondent Kenneth Mackenzie, and his friends, that he ſhould be continued in ſaid office, and diſcharge the whole duty thereof; but that one half of the ſalary ſhould be made good by him to Kindeace's family; whereby matters would be continued upon the ſame amicable footing as before: and as he, both from friendſhip to Kindeace's family, and to preſerve peace and quiet in the county, agreed to this propoſition, it had the approbation of almoſt every gentleman of property and conſideration within the county; who reſolved and agreed, that he ſhould be re-elected ſole collector of ſupply at their next annual meeting in April 1770.

But as it ſo happened, that upon one or other of the days in the beginning of April laſt, when the annual election of that year was approaching, Sir Alexander Mackenzie of Gairloch, the repreſentative of one of the moſt reſpectable families, and poſſeſſed of one of the moſt opulent fortunes in that county, loſt his life by a fall from his horſe, leaving behind him one ſon of his firſt marriage, ſtill a pupil, his general heir, and five motherleſs infants of a ſecond marriage, an opinion prevailed, that theſe children of the ſecond marriage were totally deſtitute and unprovided, the debts which Sir Alexander owed being more than ſufficient to exhauſt his perſonal eſtate, and the land-eſtate ſtrictly entailed.

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So unlucky a cataſtrophe, and the ſuppoſed miſerable ſituation of ſo many infants, the children of ſo reſpectable a family, naturally produced ſentiments of pity and compaſſion, heightened with this conſideration, that if Sir Alexander had ſurvived but a few days, he was to have been married to a young lady, the daughter of a neighbouring gentleman, a commiſſioner of ſupply of ſaid county.

The brother of the intended bride, alſo a commiſſioner of ſupply, though otherwiſe unconnected with Sir Alexander Mackenzie's family, taking advantage of the impreſſion naturally made on the human mind by ſo ſudden and tragical an event, not from any ſentiments of envy and ill-will againſt the reſpondent Kenneth Mackenzie, then ſole collector, as he verily believes, but from motives of humanity, from the ſuppoſed diſtreſſed ſituation of Sir Alexander Mackenzie's infant children, did, in concert with ſome few of his particular friends, form a ſcheme for turning the reſpondent Kenneth Mackenzie out of office, and veſting it in a truſtee, for behoof of Sir Alexander Mackenzie's five infant children; and it may have been part of that ſcheme, for any thing the reſpondent can ſay, that the half of the ſalary was ſtill to be made good to Kindeace's family, whoſe circumſtances were equally diſtreſſing.

The ſcheme was kept a dead ſecret from the reſpondent Kenneth Mackenzie, and his friends; who being lulled aſleep by the concert firſt above mentioned, entered into in the moſt ſolemn and deliberate manner with Kindeace's friends, (a fact well known to the petitioner, whether nominal or real purſuer), had not the moſt diſtant ſuſpicion of the intended oppoſition in the choice of a collector.

As this compromiſe with the friends of Kindeace's family had been approved of by almoſt every gentleman of reſpect and conſideration in the county, even by the petitioner himſelf, the perſon who was pitched upon to be ſet up as candidate for this office at the approaching election, it is a certain fact, that had the reſpondent Kenneth Mackenzie been appriſed thereof in ſuch time as to have adviſed his friends and ſupporters, the oppoſite faction would have made a very poor appearance in point of numbers; but as no oppoſition was expected, the meeting of the commiſſioners, held upon the 30th April, was unuſually thin, the commiſſioners aſſembled upon that occaſion, or pretending to be

commiſſioners, being in all but thirty-eight, which therefore is real evidence, that the projected election of the now petitioner was a mere catch, when the generality of the commiſſioners, parties to the aforeſaid concert, were not appriſed of any ſuch intention: and the petitioner knows well, that was the competition now to undergo a fair ſcrutiny, there would be at leaſt ten to one againſt him, and in favour of the reſpondent Kenneth Mackenzie, burdened with the payment of the half of the ſalary to Kindeace's family, agreeable to the concert above mentioned.

When the commiſſioners met, there was produced to them the ſupply-act of that year, being the 10th of the King, which, in nominating the commiſſioners, referred to the act of the 9th of the King; but as the clerk of ſupply was not then poſſeſſed of the act of the 9th, containing the nomination of commiſſioners referred to in the act of the 10th, the roll was obliged to be called from the act of the 2d of the King; and thus it happened, that of the thirty-eight perſons preſent upon that occaſion, the now petitioner, Roderick Mackenzie of Scotſburn, and Colin Mackenzie of Meikle Scatwell, whoſe names are contained in the nomination of the 2d of the King, but who were not contained in the act of the 9th of the King, and conſequently had no right to a voice in the choice of a collector under the act of the 10th of the King, which referred to the nomination in the act of the 9th, were called, and gave their votes; but as they happened to vote in oppoſition to each other, their being thus allowed a vote, which did not belong to them, did no wiſe influence the merits of the election itſelf.

The minute certifies, That the roll being called, (that of the 2d of the King), Sir Harry Monro of Fowlis was elected to be preſes, and Colin Mackenzie writer in Dingwall to be clerk; and it is an agreed fact, that their election was unanimous: and though no exceptions appear to have been then ſtated to the vote of Thomas Urquhart of Kinbeachie, it will readily occur to your Lordſhips, that this was not the proper time to have moved any ſuch objection, as they could not be conſtitute into any regular court, or legal meeting, till the preſes and clerk were choſen; ſo that any perſon who took a vote in the choice of preſes and clerk, did it upon his hazard.

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The minute further certifies, That when the roll came again to be called for the choice of the collector from the act of the 2d of the King, Thomas Urquhart of Kinbeachie compeared, and voted, under proteſt, that the now petitioner, Roderick Mackenzie of Scotſburn, ſhould be collector; but as no ſuch perſon appeared in the nomination in the act of the 2d of the King, from which the roll was called, the perſon named in the act of the 2d of the King being James Urquhart of Kinbeachie, not Thomas Urquhart, Mackenzie of Highfield entered his proteſt, that the vote of the ſaid Thomas Urquhart ſhould not be received; upon which ſome altercation enſued, Whether Thomas Urquhart could be allowed a voice in that election, in reſpect that his being denominated *James*, inſtead of *Thomas*, was ſaid to be a mere error in the nomination of the act of the 2d of the King; which therefore ought not to preclude him from his vote, as there could be no doubt of his being the perſon intended, though under the erroneous denomination of *James* inſtead of *Thomas*.

Had that queſtion been put to a vote, and ſuppoſing the commiſſioners to have been competent judges in that matter, it is a clear caſe, that as Thomas Urquhart of Kinbeachie could not have been allowed a voice in that queſtion, the judgement of the commiſſioners muſt have gone againſt him: but as the commiſſioners, ſeem to have doubted their own powers to give a formal judgement upon that queſtion, Sir Harry Monro, *qua* preſes, aſſuming a caſting voice upon ſuppoſition of there being an equality, gave it for the reſpondent Kenneth Mackenzie to be collector. And as a deal of time had been conſumed in this altercation, whereby the day was far ſpent, they adjourned their meeting till the 1ſt day of June thereafter, and thereby gave notice to the whole commiſſioners of ſupply to attend, in order to diſpatch what remained undone of the county-buſineſs. And by an after part of the ſame minute, upon a ſuggeſtion, that it might be made a queſtion, which of the parties had been duly elected collector for that year, as there ſtill remained a conſiderable arrear of the laſt year's ſupply, they authoriſed Colin Mackenzie writer in Dingwall, late deputy-collector of the ſupply, to receive and diſcharge the whole *arrears*, whether of the ceſs or window-tax, due, at and preceding the 5th of April current: but he was by no means thereby impowered to uplift or intromit with any part of the

the ſupply of the then current year, as ſeems to be inſinuated in the petition.

It occurred to the two candidates, that as the diſcuſſion of this controverted election, in the courſe of legal proceſs, would be attended with conſiderable expence, it would be a ſalutary meaſure to have it determined by ſubmiſſion and decreet-arbitral: and though it is not improbable, that ſome of the commiſſioners, friends to both parties, may have known and approved of this meaſure, upon ſuppoſition of its being a queſtion proper to be ſubmitted; yet they took no part therein, leaving it to the parties themſelves to do therein as they ſhould ſee proper.

Accordingly the two candidates wrote a joint letter to Meſſ. David Roſs of Inverchaſly and William Mackenzie of Belmaduthie, advocates, referring to them, and, in caſe of variance, to any overſman to be named by them, which of the ſaid parties was duly elected collector of ſupply for the current year.

June 23. 1770. Upon the back of ſaid letter, the arbiters, of this date, made the following reference. " A doubt having occurred to us, whe-
" ther, on a reference from the two competitors for the office of
" collector of ſupply for the county of Roſs, we can give any ef-
" fectual judgement for determining which of them has been le-
" gally elected by the meeting of commiſſioners of ſupply on the
" 30th April laſt, without any reference having been made to us
" for that purpoſe by the ſaid meeting, or by the ſubſequent
" meeting of the 1ſt June inſtant; we therefore have agreed to
" ſubmit this doubt to our friend Mr Alexander Tait, principal
" clerk of ſeſſion, whoſe opinion in this matter ſhall determine
" ours." (Signed) DAVID ROSS. WM MACKENZIE.

Upon this reference, Mr Tait delivered his opinion by letter of
June 23. 1770. this date, addreſſed to the arbiters, in the following words. " Had
" things remained upon the footing of the minute of the 30th of
" April, and had the whole commiſſioners on both ſides, as well
" as the canditates, agreed, in order to avoid a law-ſuit, to refer
" the diſpute to you, I ſhould have thought the affair might have
" been extricated; for after you had determined, the commiſ-
" ſioners would have met; and without taking notice of your de-
" termination, would have declared the election in terms of your
" deciſion. But as things ſtand at preſent, it appears to me, 1*mo*,
" That the tutor of Kilcoy is *actually elected*, and is in poſſeſ-
" ſion. 2*do*, That the commiſſioners are *functi*, unleſs the tutor

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" of Kilcoy ſhould either die or reſign. 3*tio*, That ſhould he " reſign, a new election would be neceſſary, without any regard " to what has already paſſed; and Scotſburn would have no more " title to the office than any other candidate. Conſequently, the " only effect which your decreet-arbitral could have, would be to " oblige the tutor, as a man of honour, to reſign; and the con- " ſequence of this again would be, not to give the office to Scotſ- " burn, but to bring on a new election. Beſides, it is to be con- " ſidered, whether, after a collector of ſupply is elected for the " year, has given bail, and begun to act, he can reſign, unleſs " the commiſſioners chuſe to accept of his reſignation; which, " in this caſe, they are not bound to do, not being parties to the " ſubmiſſion; and therefore I conſider the minute of the " of June as a bar to your decreet, and which would render it " eluſory and ineffectual. It might have the effect to induce the " tutor to reſign, and ſo make a vacancy *quoad* him, if the com- " miſſioners accepted of it: but it could never have the effect to " give the office to Scotſburn; and therefore, if I was in your " caſe, I would not incline to pronounce any decreet-arbitral, " which might hurt one of the parties, without benefiting the o- " ther, and involve the county in diſputes concerning a new e- " lection." (Signed) ALEX. TAIT.

This letter does honour to the gentleman who wrote it, and would not be unworthy of the ſentence of any judge, was it to receive a judicial determination. That he conſidered the merits of the election itſelf to ſtand in favour of the reſpondent Kenneth Mackenzie, ſeems abundantly clear. The doubt he entertained, whether this was the proper ſubject of a ſubmiſſion, ſhall in the ſequel be ſhown to be well founded; and that ſuppoſing it to be the proper ſubject of a ſubmiſſion, the whole commiſſioners on both ſides ought to have been parties thereto; and that ſuppoſing them to have been parties to the ſubmiſſion, all the effect of a decreet-arbitral in favour of the petitioner, would have been, to have obliged the collector in office to have reſigned the ſame, in order to a new election, in caſe the reſignation ſhould be accepted of by the commiſſioners; but that it would not transfer the former election to the petitioner; and therefore, upon the whole, adviſes no decreet-arbitral to be thereupon pronounced; in which opinion the arbiters acquieſced.

In purſuance of the adjournment by the meeting 30th April, only ſeventeen commiſſioners met upon the 1ſt of June; which is

real evidence, that this could be no packed meeting, ſolicited or procured by the reſpondent Kenneth Mackenzie, or his friends, with a view to ſteal a march upon the petitioner and his friends. Had any thing of that kind been in view, he could eaſily have brought to that meeting at leaſt five to one; but as none of the public buſineſs had been done in the meeting 30th April, by reaſon of the diſputes in the choice of the collector, and as therefore that meeting had been adjourned to the 1ſt of June, the whole commiſſioners were warned *apud acta* to attend that meeting; ſo that there could be no ſtolen march; and accordingly only ten of thoſe who favoured the reſpondent Kenneth Mackenzie's intereſt did attend upon that occaſion.

It was the petitioner, not the reſpondent, who had in view to have ſtolen a march at that meeting, and ſolicited as many of thoſe who had given him their voices on the 30th April as could be prevailed with to attend the ſame, amounting in whole to the number ſeven; and even of theſe, the petitioner well knows, that ſeveral would have voted againſt him, had the merits of his election been canvaſſed that day. The reſpondent has been informed, that the reaſon why ſeveral of thoſe who had given their votes for him to be collector in the meeting of the 30th April, with a view to the intereſt of Sir Alexander Mackenzie's infant children, did now draw back, was the diſcovery which by this time had been made of the error or miſtake that theſe children were deſtitute and unprovided; whereas they had not only proviſions by their father's ſettlement, but their elder brother was burdened with the expences of their aliment and education till they ſhould be of age; inſomuch that it was matter of juſt offence to the neareſt relations of that family, that theſe children ſhould be thrown upon the county as objects of charity.——Nay, the petitioner well knows, that for this very reaſon, not even a fourth part of the commiſſioners who appeared for him at the meeting of the 30th April, would give him their votes on any ſubſequent occaſion; as it cannot be denied, that ſome other arguments were made uſe of to make converts to this new ſet-up faction, which, it muſt be now admitted, would much better have been let alone, though, but for theſe, the preſent action never could have exiſted.

The meeting being conſtitute by the choice of preſes and clerk, the minute of the 30th April was read; and as, *ex facie* of that minute, the reſpondent Kenneth Mackenzie had been certified to be the collector duly elected by a majority of legal votes, but had not hitherto

hitherto received his commiſſion, nor found caution, a queſtion was propoſed, Whether a commiſſion ſhould not now be made out to him, in terms of the minute of the 30th of April?

This was objected to by one of the commiſſioners on the ſide of the petitioner, upon a variety of grounds: *1ſt*, That computing the vote of Urquhart of Kinbeachie, there was a clear majority of legal votes in the meeting of the 30th April in favour of the petitioner. *2dly*, That Kinbeachie's miſnomer in the act of the 2d of the King, from which the roll had been called in the meeting of the 30th April, had been corrected in the after act of the 9th of the King, where he was rightly named. *3dly*, That the queſtion between the two candidates, reſpecting the merits of that election of the 30th April, had been ſubmitted, by approbation of the commiſſioners.

But as the majority of that meeting were of opinion, that it did not belong to them to take under review the proceedings of the 30th April, or of the qualifications of thoſe who voted in that meeting, or to do any thing further in relation thereto, but to carry the ſame into execution, by ordering a commiſſion to be made out in favour of that perſon, who, by the aforeſaid minute, was certified to be the perſon elected, to the end that caution being found, the collection of the ſupply of that year might proceed; a majority of the meeting, the minority being *non liquets* on this occaſion, ordered and appointed a commiſſion to be made out in favour of the ſaid Kenneth Mackenzie: which being accordingly done, and the commiſſion ſigned by the preſes, in name, and by appointment of the meeting, Thomas Mackenzie of Highfield became cautioner for him; and in purſuance thereof, the reſpondent Kenneth Mackenzie entered immediately upon the exerciſe of that office, has levied three quarters ceſs, and is *in curſu* of levying the other quarter, when his election is now brought under challenge by this proceſs of reduction and declarator.

The petitioner, either real or nominal, fretted by this diſappointment, beſtows hard names upon the actings of the commiſſioners in their meeting of the 1ſt June, as being equally irregular and unjuſt; *irregular*, as they proceeded, during the dependence of an arbitration, upon which the parties had relied, to paſs any judgement whatever in the matter; *unjuſt*, in ſo far as they give judgment in favour of that perſon againſt whom the real merits of election lay.

As to the *firſt* of theſe: Allowing it to be true, that ſome of the commiſſioners on both ſides were in the knowledge of the reference

ence, and had even approven thereof as a proper meaſure for having that queſtion amicably determined; as nothing of that kind appeared upon the face of the minute of the 30th of April, which was the directory for their proceedings in the adjourned meeting of the 1ſt of June, it would have been highly improper for them to have allowed the public affairs of the county, the proportioning the ceſs, giving out the collector's commiſſion, taking caution from him, &c. to have remained any longer in ſuſpenſe, in the expectation of a decreet-arbitral, which, for any thing to them known, might have been poſtponed or delayed ever ſo long, tho', by the letter of reference, as now produced, it appears, that the ſame was limited to the 25th June; and which letter of reference, as wanting all the legal ſolemnities of probative and obligatory writs, was *funditus* void and null, and which of conſequence muſt have annulled any award or decreet-arbitral which might have followed thereupon, *eſto* it had been the proper ſubject of a ſubmiſſion; but which, for the reaſons very properly taken notice of in the overſman's letter, and what further will, in the ſequel, be obſerved in confirmation thereof, neither was, nor could be, the proper ſubject of a ſubmiſſion and decreet-arbitral between the two collectors, without the concurrence of the whole commiſſioners of ſupply.

And as to the other ground of challenge, viz. the alledged iniquity of this judgement by the meeting of the 1ſt of June, it cannot eſcape your Lordſhips obſervation, how improperly it is characteriſed a judgement, when they ſo carefully avoided taking any cogniſance of the merits of the election itſelf, and regulated their conduct in exact conformity to the minute of the 30th of April; doing neither more nor leſs than ordering the commiſſion to be made out in favour of that perſon, who, by the minute of the 30th April, was certified to be duly elected; and ſhould have thought themſelves highly to blame, if they had delayed giving out the commiſſion, receiving the caution, and proportioning the ſupply, in expectation of a decreet-arbitral, upon a ſubmiſſion to which they were no parties, and which, for any thing to them known, might not come to hand for a conſiderable ſpace, when in the mean time the collecting of the ceſs, and other public buſineſs, muſt have ſuffered conſiderably.

As for the reſpondents conduct ſince the cauſe came into court, it is ſubmitted to your Lordſhips, with what juſtice or propriety they

they are accuſed of tergiverſation. When the cauſe was firſt called, they were not adviſed that the petitioner meant to ſatisfy the production, and therefore were not prepared to ſtate their defences: ſo that the whole of this mighty affair is, that they did not repreſent to the Lord Ordinary quite ſo ſoon as they might have done, had they been previouſly appriſed that the petitioner was himſelf to ſatisfy the production, in order immediately to obtain great aviſandum. There have been but *two* callings in the outer houſe ſince it firſt came into court, and it is now in the way of receiving a judgement of your Lordſhips, which, it is hoped, will be final and deciſive; and if the petitioner, whether the real or nominal purſuer, ſhall ſo very timeouſly get his final diſpatches, he will complain without reaſon of his hanging on. Beſides, as the proceedings complained of are as old as the 1ſt of June, and all the defenders within Scotland, it is evident, that had the petitioner been in any great hurry to bring on this cauſe, it muſt have been much further advanced by this time.

In this view of the caſe, it would be improper for the reſpondents to enter into any long argument upon the merits of the election itſelf. The commiſſioners of ſupply do not conſider themſelves to be veſted with any powers to judge of the qualifications of thoſe whoſe names appear in the nomination. If their names are there, whether qualified in other reſpects or not, they may take their vote, and there is none to debar them therefrom. If, on the other hand, their names do not appear in the nomination, was it ever ſo certain that they were intended to be there, and from whatever cauſes, their names not being in the nomination, or being erroneouſly named and deſcribed, it does not belong to the other commiſſioners to take cogniſance of that matter, or to take proofs for amendment and correction of the ſuppoſed error. This would open a door to ſuch practices as would be attended with very undeſireable conſequences.——The act of nomination is the text, beyond which they cannot go. It was the buſineſs of Urquhart of Kinbeachie, whoſe name did not appear in the act of the 10th, otherwiſe than by reference to the act of the 9th, to have adverted, that the act of the 9th ſhould be produced to the meeting; but as that had been neglected, and as the act of the 2d of the King was the only roll from which the votes were to be called in the choice of the collector, it was impoſſible, that, under that act, the vote of *Thomas* Urquhart of Kinbeachie

could be admitted or taken for the vote of *James* Urquhart of Kinbeachie. The name of baptiſm is the name of diſtinction between perſons of the ſame ſirname. There might be a James Urquhart of Kinbeachie, as well as a Thomas Urquhart, either of that county, or of other counties, as ſuch blunders are daily committed in nominating perſons, either totally unqualified, or whoſe qualifications lie in another county.——But theſe are matters of which the commiſſioners of ſupply can take no cogniſance. James Urquhart of Kinbeachie appeared in the nomination of the 2d of the King. Thomas Urquhart of Kinbeachie, and John Urquhart of Kinbeachie, elder and younger, appear in the nomination of the act of the 9th of the King; why then might not John Urquhart younger of Kinbeachie, as well as Thomas Urquhart elder of Kinbeachie, have claimed and taken a vote in the election of the 30th of April, under pretence, that as James Urquhart of Kinbeachie, in the act of the 2d, was an error or miſtake, either of the other two might, with equal reaſon, alledge, that they were the perſons intended, though in competition between father and ſon the preference might probably have been given to the father? It is admitted, in p. 7. of the petition, that if there had been *two* Urquharts of Kinbeachie, there might have been room for the quibble. The reſpondents have ſhown, that there were two of that name and deſignation in the act of the 9th, but neither of them carrying the name of *James*; and as the nomination in the act of the 2d was the only roll called, and by which the votes were to be collected, that nomination behoved to be the rule of judgement or determination upon the merits of the election itſelf.

The petitioner ſtates the fact to have been, that no exception was taken to the vote of Kinbeachie in the choice of preſes and clerk; from which he would infer, that being once admitted without objection, it was not competent to move any objection to him in the after ſteps of that election.

But the reſpondents can neither agree to the truth of this fact, or to the conſequence drawn therefrom. There appear thirty-eight commiſſioners claiming to vote, including Alexander Mackenzie of Sand, and *James* Urquhart of Kinbeachie, for ſo his name ſtands in the liſt of perſons preſent prefixed to the minute of the 30th of April. The whole meeting was unanimous in the choice of preſes and clerk; ſo that no vote was put to the meeting for the election of preſes and clerk, and which is the general practice in all theſe meetings, when there is no diſpute. But allowing,

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for argument's ſake, that a vote had been actually put, and that both Sand and Kinbeachie had given their votes without objection, this could never intitle them to a vote in the choice of collector, if not otherwiſe duly qualified; becauſe, till the meeting was conſtitute by the choice of preſes and clerk, no objection could be received or judged.

Of the above thirty-eight perſons, Alexander Mackenzie of Sand claimed no vote in the election of collector, as he had not the legal qualification of L. 100 Scots of valued rent. This reduced the number of perſons claiming a vote in the election of collector, to thirty-ſeven, including James Urquhart of Kinbeachie: eighteen of theſe voted for the reſpondent Kenneth Mackenzie, and the remaining nineteen, including Kinbeachie, for the petitioner; but as Thomas Urquhart's vote, under the nomination of *James Urquhart*, could not be admitted, whereby the numbers were reduced to an equality, Sir Harry Monro, the preſes, gave his caſting vote for the reſpondent.

Was it proper, upon this occaſion, to enter further into the argument upon the merits of the election itſelf, the reſpondent could ſuggeſt various other conſiderations in ſupport of what has been already hinted at upon that head; but as the debate before the Lord Ordinary was confined to this ſingle point, Whether the proceſs could proceed, in reſpect that all thoſe having intereſt therein, were not made parties thereto, either as purſuers or defenders? and the Lord Ordinary having given judgement thereon in their favour, whereby this inſtance at leaſt is quaſhed, unleſs your Lordſhips ſhall ſee cauſe to alter the Lord Ordinary's interlocutor; that is the only point which now lies before your Lordſhips.

And the objection reſts upon this ſolid principle of law, juſtice, and common ſenſe, That no proceſs can be ſuſtained, where the perſons principally intereſted therein, are not made parties thereto; and therefore, if the reſpondents ſhall be able to ſatisfy your Lordſhips, that the commiſſioners of ſupply have not only a material intereſt in this queſtion, Which of the two canditates ſhall be their collector? but have the chief, if not the only, intereſt in that queſtion, in ſo far as they are both primarily and ultimately liable for the collector by them appointed; it will be impoſſible, by any fair argument, to deny that they ought to have been parties to the proceſs, the tendency of which is, to impoſe a collector upon them, for whom they muſt be anſwerable.

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The petitioner feels the weight of this objection, and therefore endeavours to give it a go-by, upon ſuppoſition, that the county in general is ultimately liable in relief to the commiſſioners; ſo that, by the ſame argument, the whole heritors in the county ſhould be made parties to the proceſs.

Were the premiſſes to be allowed, the conſequence would not follow; but the reſpondents deny both the one and the other, and are hopeful, in the ſequel, to ſatisfy your Lordſhips, that they are both equally ill founded.

Another erroneous propoſition which the petitioner has aſſumed, is, That as the commiſſioners of ſupply act ſpontaneouſly, and without fee or reward, for the ſervice of the public, it would be grievous to them, were they to be made parties to every cauſe wherein their proceedings as commiſſioners of ſupply are brought under challenge.

That it is a ſpontaneous office, in which they are at liberty to act or not as they ſhall think proper, is what the reſpondents can by no means admit: ſo far to the contrary, that, as in the ſequel to be proved, they are not only compellable to accept, but to act. This country would be in a moſt deplorable ſituation, was this doctrine to prevail, That the commiſſioners in all the counties in Scotland, might, with one accord, refuſe to act. Their chief buſineſs in proportioning and levying the ceſs, is a duty they owe to their country, in ſome reſpects ſimilar to that of juries, which the jurors are not at liberty to decline. The nomination of commiſſioners, for the moſt part, comprehends all the landholders of any conſideration in the reſpective counties; it is chiefly out of their eſtates that the land-tax is to be raiſed; which made it the more reaſonable that they ſhould not only have been truſted with the levying the ſame, but ſhould have been intitled to name their own collector.

And upon theſe principles, as now to be eſtabliſhed from the law itſelf, the reſpondents aſſume this general propoſition, That the county in general is ſo far from being bound to relieve the commiſſioners, that the commiſſioners are primarily and ultimately liable for the ceſs; and can have no recourſe but againſt the individuals who are deficient in their quotas, and to that extent only: for though the orders for quartering muſt be iſſued againſt the county in general, as the receiver-general cannot know who are the perſons deficient, it is the commiſſioners and their collector who have the ordering of the quartering; which they dare

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not be anſwerable to impoſe upon any perſon who has already paid his quota to them, or their collector, be the other deficients ever ſo many. And, to ſay all in one word, it is the commiſſioners themſelves who are bound to make good the ceſs. It is for this reaſon that they have the choice of the collector, for whom they are anſwerable, and may take caution from him or not as they ſhall think proper.

In the more early periods of the law, and before that the ceſs and ſupply was brought to that eſtabliſhment upon which it now ſtands, and when taxations were in uſe to be granted from time to time as the exigencies of government ſeemed to require; as the Three Eſtates did ſeverally collect that proportion of the taxation laid upon them reſpectively, it was the duty of the ſheriff to collect the taxation from the barons and freeholders of the King, with relief to them againſt their vaſſals; and for effectuating this, he was authoriſed to convene the barons and freeholders, and by their counſel to chuſe leill men and diſcreet, and ſik as he will anſwer for.

This is clear, from the Black Acts, *Of the manner of taxation to be made in the realm*, which is declared to be, " That ilk " ſheriff within his ſheriffdom ſhall gar call before him all " the barons and freeholders of the King, and with counſel " of them he ſhall cheiſe leill men and diſcreet, *and ſik as he will " anſwer for.*" From which your Lordſhips will perceive, that even in this early period, when it was the duty of the ſheriff to collect from the barons and freeholders their ſhare of the taxations; though they were allowed to employ others under them, they were made anſwerable for the perſons ſo employed. 1424. cap. 17.

By this act, intitled, *For inbringing of the taxation*, it is ſtatuted, " That for the taxt of barrones and temporal perſons that ſould " be raiſed and taken of the ſheriffs and baillies, and other offi- " ciars of the King's, it is adviſed by the ſaid Lords, that the " ſaid ſheriffs and baillies, and other officiars, being ſo oft-times " charged be the King's letters, and are now called to be here; " that therefore they be now charged be officiars of the Kinges " to be before the Chancellor and Lords of Counſel, on Friday " that next commis, in George Robieſones Inneſs, to make full " compt and payment of the ſaid taxt, and in likewiſe, that all " ſheriffs, provoſts, and baillies of burghs, and all other officiars, 1489. cap. 9.

" which comes not here, nor is preſent, that letters incontinent " be written to them, charging them to raiſe, inbring, and pay " the ſaid taxt to an ſhort day; or elſe, that they be charged to " enter their perſons in ward within the caſtle of Blackneſs, " within 15 days, gif they faillie of the inbringing and paying " of the ſaid taxt, under the pains of rebellion, and putting of " them to the horn, confiſcation, and eſcheiting of all their pro- " per goods to the King's uſe." So that here, ſheriffs, provoſts, and bailies, are not only ordained to uplift and collect this tax, but, on their neglect or failure ſo to do, within a ſhort day, they are to be charged to enter their perſons in ward, under the ſevere pains of rebellion, puting them to the horn, confiſcation, and eſcheating of all their proper goods to his Majeſty's uſe.

1597. cap. 281 By this act, intitled, *An taxation to be granted to the King, the form and manner of the uptaking thereof*, it is, *inter alia*, ſtatuted, " That for the barons and freeholders part of ſaid taxation let- " ters be direct, charging all and ſundry ſheriffs, ſtewards, bai- " lies, their deputes and clerks, that they, and ilk ane of them, " within the bounds of their reſpective juriſdictions, raiſe and " uplift the ſum of 40 s. of every pound land of old extent, lying " within the bounds of their juriſdiction, and inbring and deli- " ver the ſame to the ſaid collector-general betwixt and the 15th " day of March, which is the term of payment of ſaid taxation, " under the pain of rebellion." So that here again the ſheriffs and ſtewards are made anſwerable for the collection, to make it good againſt a certain day, under the pain of rebellion.

1621 cap 2. This is ſtill more clearly expreſſed in the ſtatute 1621, cap. 2. anent the taxation granted to his Majeſty by that act, whereby it is enacted, *That theſe heritable offices*, (viz. the ſheriffs, ſtewards, &c.), *and their deputies, for whom they ſhall be holden to anſwer*, ſhall collect the ſaid taxation, and make payment thereof to his Maje- ſty's collector-general. And the ſame thing is re-enacted by the ſtatute 1633, cap. 1.

1661. cap. 14. An act intitled, *Act for raiſing the annuity of L. 40,000 granted to his Majeſty*. This is the firſt act nominating commiſſioners for putting the act in execution, which therefore will be particularly attended to, as " power is thereby granted to the ſaid commiſſion- " ers to meet and convene, at ſuch times and places as they ſhall " think fit, and to chuſe their own convener, *and to appoint their*

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" *own collectors*, except the clerk, who is to be named by the clerk " of regiſter. —— And it is thereby further ſtatuted, That the " commiſſioners of the reſpective ſhires and burghs ſhall be, and " are, obliged to pay in their reſpective proportions of the ſaid " ſhires and burghs to ſuch as are, or ſhall be, appointed by his " Majeſty to receive the ſame." And as action of relief is thereby given to them againſt the perſons liable in ſaid taxation, this alſo proves, that the collectors were primarily liable to the crown to make good this taxation.

This is ſtill clearer, from the *act of the convention of Eſtates*, of this date, which is the *regula regulans* at this day, and to which all the after ſtatutes refer, mediately or immediately. 1667

By this act it is not left to the choice of the commiſſioners named, whether they will accept or not; but they are thereby *ordained to accept, and diſcharge their truſt, as they will be anſwerable*; and at their acceptation thereof, to take the oaths of allegiance, and *for doing their duty faithfully in the matter of this adminiſtration*. And the ſaid commiſſioners are alſo hereby impowered to preſcribe and ſet down ſuch rules and orders, within their reſpective ſhires and boroughs, as may be moſt effectual for the ſpeedy and eaſy raiſing, levying, and bringing in of the ſaid ſupply, and ordering and doing every thing that may concern the ſame; and, particularly, " *with power to them to chuſe their own collectors for* " *ingathering of the ſaid ſupply, for whom they are to be anſwerable*; " and to allow them, and their clerks, ſuch fees, to be paid by the " ſhires and boroughs, as they ſhall think fit. And all execu- " tion, real and perſonal, is thereby ordered to paſs at the in- " ſtance of the collector-general, and the collectors of the reſpec- " tive ſhires and boroughs, *againſt all perſons deficient in payment of* " *their proportions, as formerly*." And for the more ready and effectual payment, impowers the commiſſioners and collector-general to quarter upon deficients.

From theſe clauſes, of the tenor above recited, in this act of convention, the following particulars are clearly eſtabliſhed. *1ſt*, That the commiſſioners were bound to accept and officiate; *2dly*, That they were bound to make good the ſupply; and for any deficiency, to recur againſt thoſe who were in arrear; *3dly*, That they had the choice of their own collector, and were anſwerable for him.

The act 1670, cap. 3. the act 1672, cap. 4. the act of convention 1678, the act 1681, cap. 3. the act 1685, cap. 12. the act 1686,

1686, cap. 2. the act 1689, cap. 32. the act 1690, cap. 6. do all and each of them proceed upon the plan and model of the act of convention 1667, and do ſeverally authoriſe the commiſſioners to name their own *collector, for whom they ſhall be anſwerable.*

The act 1693, cap. 2. for raiſing a new ſupply, refers to the act 1690; and ſtatutes, That all clauſes contained in the former acts of parliament, and conventions of the eſtates, in relation to the inbringing of the ceſs, and quartering, ſhall ſtand in full force as to this ſupply now impoſed, in the ſame manner as if they were inſert therein.

1695. This act refers to the act 1690, cap. 7. holding the ſame as therein repeated; and authoriſes the commiſſioners " *to appoint collectors,* " *with ſufficient caution, as they ſhall think fit;* and declares, That " all clauſes contained in the former acts of parliament, and " conventions of the eſtates, in relation to the inbringing of the " ceſs, and quartering, ſhall ſtand in full force as to this ſup- " ply."

1696. cap. 1. This act grants a ſupply of eighteen months ceſs upon the land-rent, to be levied conform to the directions preſcribed by the ſupply-acts 1690 and 1695, with " *power to them to appoint collectors,* " *with ſufficient caution, as they ſhall think fit;*" declaring, That all clauſes in the former acts of parliament, and convention of eſtates, in relation to the inbringing of the ceſs, and quartering, ſhall ſtand in full force as to this ſupply.

The after ſupply-acts, of 1698, cap. 1. 1701, cap. 15. 1702, cap. 6. 1704, cap. 4. 1705, cap. 7. and 1706, cap. 2. are preciſely in the ſame terms; the laſt always referring to the preceding one, and all and each conſtantly referring to the whole former acts of parliament, and convention of eſtates, in relation to the inbringing of the ceſs, and quartering.

And more particularly, the act 1706, which is the laſt ſupply-act of the parliament of Scotland, impowers the commiſſioners to appoint *collectors, with ſufficient caution, as they ſhall think fit*; and declares all clauſes contained in former acts of parliament and convention of eſtates, in relation to the inbringing of the ceſs and quartering, to ſtand in force as to that ſupply.

All the ſupply-acts ſince the Union, ſo far as they relate to the ceſs payable out of this part of the united kingdom, refer to the former acts of the parliament of Scotland, and convention of eſtates.

And more particularly, the ſupply-act of the 10th of his preſent Majeſty declares the commiſſioners thereby named to have power to chuſe their own clerk, and to do every thing concern-

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ing the ſaid ſupply as is preſcribed and appointed by the ceſs-act of the 6th of November 1706, and other acts made in any former parliament of Scotland, to which the ſaid act of the 6th November 1706 doth relate; and they are thereby *inter alia* authoriſed to appoint *collectors, with ſuch caution as they ſhall think fit*; and declaring, that all clauſes contained in former acts of the parliament of Scotland, and convention of eſtates there, in relation to the bringing in of the ceſs, and quartering, ſhall ſtand in full force as to the ſupply now impoſed.

Theſe acts of parliament and convention are ſo expreſs in making the commiſſioners liable to make good the ceſs, and anſwerable for the collectors by them appointed, from whom they are at liberty to take caution or not as they pleaſe, that they do not require to be ſupported by any authority; but that they may not ſeem to ſpeak altogether without book, they refer your Lordſhips to a caſe in the Dictionary, vol. 1. fol. 576. under the title, *Minor*, 25th July 1735, Hay of Hopes *contra* Hepburn of Monkrig; where, in a competition, which of the two was legally choſen collector, it was found, That a commiſſioner of ſupply is, by the nature of his office, a judge, and *alſo liable as cautioner for the collector*; and therefore, that he, as a minor, could not be intitled to a voice in the choice of collector.

And agreeable to theſe, Lord Bankton, vol. 2. fol. 575. title, *Commiſſioners of Supply*, § 1. obſerves, That commiſſioners of ſupply are impowered to do every thing concerning the ſupply as is preſcribed in the ceſs-act 1706, and the acts therein referred to: That in conſtituting the meeting, and chuſing a preſes, all who are in the nomination may vote upon their hazard; becauſe till that is done, there is no regular meeting or court; and without ſuch, the objections againſt any of the commiſſioners cannot be judged; February 1730, Roſs *contra* Agnew. And in the ſame title, § 2. he obſerves, That commiſſioners of ſupply have power to name a collector of ſupply, *for whom they ſhall be anſwerable*; and therefore generally they exact caution from them.

And it being thus eſtabliſhed by theſe multiplied authorities, that the commiſſioners are liable to make good the ceſs; and therefore have a power to name their own collector, for whom they are anſwerable, and may, or may not, exact caution, as they pleaſe, nothing can be clearer, than that they are neceſſary parties to every queſtion of this kind, the ſcope and tendency of which is to fix a collector upon them.

What they do in the character of judges, as in the diviſion

of *cumulo* valuations, ſtands upon a very different footing. They have no patrimonial intereſt in theſe; and therefore are not neceſſary parties more than other judges: but the collector being their ſervant, for whoſe actings they are anſwerable, it concerns them much, that a collector ſhall not be impoſed upon them.

Nor is this any wiſe peculiar to the caſe of commiſſioners of ſupply. Before the ſtatute of the 16th of the late King, if any perſon claiming to be inrolled in the roll of freeholders for any county, was refuſed to be admitted upon the roll, the freeholders in general were conſidered to have ſo ſtrong an intereſt that none ſhould be admitted upon the roll who were not duly qualified, that in every ſuch caſe the whole freeholders behoved to be made parties to the queſtion in one ſhape or other, either as purſuers or defenders; and it required a ſpecial clauſe in the ſtatute of the 16th of the late King, whereby the court of ſeſſion, upon complaint made of any ſuch wrong done by a meeting of freeholders, was authoriſed to grant warrant for ſummoning thoſe perſons upon whoſe objections the party complaining was ſtruck off, or left out, to anſwer upon thirty days notice, and to proceed and determine the ſame in a ſummary way.

The commiſſioners of ſupply have a much ſtronger intereſt in any queſtions reſpecting the election of their collector, than a meeting of freeholders in the inrolment of any particular perſon. If the collector is negligent, is guilty of any fraud, or if his cautioners fail, the commiſſioners are liable, and muſt make good the loſs; which is as ſtrong an intereſt as can well be conceived in a queſtion of this nature.

And ſuch alſo continues to be the law at this day in caſes reſpecting the controverted elections of magiſtrates, deacons of the ſeveral incorporations, counſellors, &c. in all the royal boroughs in Scotland. It is not ſufficient that the competing magiſtrates, &c. are made parties. Every individual among the electors has an intereſt in the choice; and therefore, if they do not concur in the purſuit, they muſt be called as defenders: and, ſo far as the reſpondents are informed, this rule has been uniformly followed in every queſtion reſpecting ſuch elections. It was ſo done in the petitions and complaints 1759, for reducing the election of four deacons for the town of Dumfries; again, in the petition and complaint 1760, at the inſtance of William Corie, deacon of the incorporation of baxters in the town of Inverkeithing; again, in the petition and complaint of George Dundas, deacon of the incorporation of tailors in ſaid borough, in the

ſame

ſame year 1760; ſo alſo in the petition and complaint of Robert Murray, deacon of the incorporation of weavers in ſaid borough, in the ſame year 1760; and more recently in the petition and complaint 1769, at the inſtance of George Allan, reſpecting the election of the incorporation of hammermen in the borough of Kinghorn: and your Lordſhips will probably remember a late caſe, from the borough of Anſtruther Eaſter, where a complaint againſt an election of magiſtrates and counſellors was diſmiſſed on account of a miſtake in the Chriſtian name of one of the counſellors in the prayer of the complaint.

The laſt point argued in the petition is indeed ſingular and extraordinary, viz. That though the foundation of the Lord Ordinary's interlocutor could be ſupported, the concluſion drawn from it goes too far, where it diſmiſſes the proceſs totally: That the only ground for inſiſting that the commiſſioners ought to be made parties to the proceſs, is that concluſion of the libel which inſiſts, that the reſpondent Kenneth Mackenzie ſhould be turned out of office, and the petitioner put in his place; but that the commiſſioners have no intereſt in the private diſpute between the competing collectors, which of them was duly elected, ſo as to be intitled to the emoluments of the office; and therefore that, *quoad hunc effectum*, the action ſhould be allowed to proceed.

But this is plainly out of all ſight: Was the petitioner to prevail in having his election declared at this late hour of the day, it might be made a queſtion, what part of the ſalary he ſhould be intitled to? or, in other words, whether the ſalary ſhould be ſeparated from the office? And although the reſpondent Kenneth Mackenzie has performed the whole duty of the office for this year, he ſhould have his labour for his reward; and the petitioner, who has done nothing, ſhould have the full ſalary.

But in the ſhape in which matters ſtand at preſent, if the proceſs cannot proceed, becauſe the commiſſioners of ſupply are not made parties thereto; as he is in poſſeſſion of the office, and muſt neceſſarily be continued therein, till ſuch time as the petitioner ſhall prevail in having it found, that he is the perſon duly elected collector, it is merely impoſſible that the article of ſalary ſhould be the ſubject of debate, when the point of right with regard to the office itſelf, can receive no judgement.

In reſpect whereof, it is hoped your Lordſhips can have no difficulty in affirming the Lord Ordinary's interlocutor, and diſmiſſing the proceſs ſimpliciter.

ALEX. LOCKHART.